REMARKS

This application has been amended in a manner that is believed to place it in condition for allowance at the time of the next Official Action.

Claims 1-4, 10, 11, 13, 15-19, 26, and 29-32 are pending in the present application. Claims 5-9, 12, 14, 20-25, 27, 28, and 33-35 are canceled without prejudice and may be the subject of a divisional application.

Claims 1-4, 10, 11, 13, 15-19, 26, and 29-32 were rejected under 35 USC §103(a) as allegedly being unpatentable over WO 99/36445 (English equivalent U.S. 6,197,287) in view of FR 97-04876 (English equivalent U.S. 6,353,034). This rejection is traversed.

Applicants respectfully submit that there is no motivation to combine U.S. '287 with U.S. '034. The problem solved by each of the references is different. U.S. '287 is directed to an inverted latex that is intended to be added to a cosmetic formulation. U.S. '034 is directed to a particular emulsifier that is intended to be added to a cosmetic formulation, in combination with other emulsifiers. In other words, the inverted latex of U.S. '287 is an intermediate product, and the emulsifier of U.S. '034 is intended to be added to a final product composition. As a result, one of ordinary skill in the art would lack the motivation to combine and modify the publications to obtain the claimed invention.

Nevertheless, even if one skilled in the art were to combine the publications, the proposed combination does not teach a self-invertible inverse latex composition comprising an oil phase with the constituent solvent being fatty acid esters, an aqueous phase, at least one emulsifying agent of water-in-oil type, at least one emulsifying agent of oil-in-water type and 20% to 70% by weight of a branched or crosslinked polyelectrolyte, as recited in the claimed invention.

Although '287 may disclose moisturizing cream composition with an inverted latex and fatty acid esters, U.S. '287 does not teach a composition wherein fatty acid esters make up a constituent solvent of the oil phase of an inverse latex as recited in the claimed invention. In this regard, the Official Action fails to show that it would be obvious to one skilled in the art to replace the oil phase of the inverted latex of U.S. '287 with fatty acid esters such as octyl palmitate.

In an effort to remedy the U.S. '287 for reference purposes, the Official Action cites to U.S. '034.

U.S. '034 teaches compositions that include an oil phase of fatty acid esters and synthetic polymer stabilizers, including crosslinked polymers. However, there is simply no suggestion to use an oil phase of fatty acid esters and synthetic polymer stabilizers in a self-invertible inverse matrix composition.

Thus, even if one were to combine the references, the combination does not teach the claimed invention. At best, one

skilled in the art would arrive at a cosmetic composition comprising an inverted latex without alkyl/glycosides or fatty acid esters as the constituent solvent in the oil phase of the latex. Alkyl glycosides and optionally fatty acid esters are present in the composition, but separate from the latex.

The Examiner is also reminded that a critical step in analyzing obviousness pursuant to 35 U.S.C. §103(a) is casting the mind back to the time of the invention, to consider the thinking of one of ordinary skill in the art, only guided by the publications and then-accepted wisdom in the field. Close adherence to this methodology is important in cases where the invention itself may prompt an Examiner to "fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention taught is used against its teacher." Indeed, to establish a *prima facie* case of obviousness, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant. *In re Kotzab,* 217 F.3d 1365, 1369-70, 55 USPQ 2d 1313, 1362 (Fed. Cir. 2000). The fact that the prior art could be so modified would not have made the modification itself obvious unless the cited publications themselves suggested the desirability of the modification. *In re Gordon,* 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984).

In light of the lack of a motivation, suggestion or teaching of the desirability of making the claimed combination,

applicants believe that the publications fail to disclose or suggest the claimed invention.

Therefore, applicants respectfully request that the rejection be withdrawn.

Claims 1-4, 10, 11, 13, 15-17, 26, 29-32 were rejected on the ground of non-statutory obviousness-type double patenting as allegedly being unpatentable over claims 1-15 of U.S. Patent No. 6,197,287. This rejection is traversed.

As the Examiner is aware, a double patenting rejection of the obviousness-type is "analogous to [a failure to meet] the nonobviousness requirement of 35 U.S.C. 103" except that the patent principally underlying the double patenting rejection is not considered prior art. *In re Braithwaite*, 379 F.2d 594, 154 USPQ 29 (CCPA 1967).

In this regard, when considering whether the invention defined in a claim of an application would have been an obvious variation of the invention defined in the claim of a patent, the disclosure of the patent may not be used as prior art. *General Foods Corp. v. Studiengesellschaft Kohle mbH*, 972 F.2d 1272, 1279, 23 USPQ2d 1839, 1846 (Fed. Cir. 1992).

Therefore, any analysis employed in an obviousness-type double patenting rejection parallels the guidelines for analysis of a 35 U.S.C. 103 obviousness determination. *In re Braat*, 937 F.2d 589, 19 USPQ2d 1289 (Fed. Cir. 1991); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985).

As noted above, U.S. '287 may disclose a moisturizing cream composition that happens to contain an inverted latex and octyl palmitate. However, U.S. '287 does not claim an oil phase with the constituent solvent being fatty acid esters as set forth in the claimed invention. Furthermore, U.S. '287 does not teach that a composition wherein fatty acid esters make up a constituent solvent of the oil phase of an inverse latex as recited in the claimed invention.

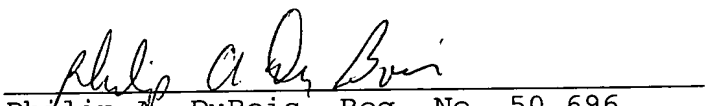
Therefore, applicants respectfully request that the rejection be withdrawn.

In view of the above, applicants believe the present application is in condition for allowance at the time of the next Official Action. Allowance and passage on that basis is respectfully requested.

The Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 25-0120 for any additional fees required under 37 C.F.R. § 1.16 or under 37 C.F.R. § 1.17.

Respectfully submitted,

YOUNG & THOMPSON



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